

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY RAY BLAYLOCK,

Defendant and Appellant.

H037280

(Monterey County
Super. Ct. Nos. SS101645 &
SS102694)

Defendant Danny Ray Blaylock was convicted by no contest plea in one case (SS101645) of one count of discharge of a firearm with gross negligence in violation of Penal Code section 246.3, subdivision (a).¹ While on probation in that case, Blaylock was convicted by no contest plea in a second case (SS12694) of one count of second degree burglary in violation of section 459, with an admitted prior strike within the meaning of section 1170.12, subdivision (c)(1), his conviction in the first case. In addition, the court found him in violation of probation. Sentence was suspended and he was again placed on probation. Blaylock later admitted yet again violating probation based on a new charge of reckless driving in violation of Vehicle Code section 23103, subdivision (a), a misdemeanor. Probation was revoked and the court sentenced Blaylock

¹ Further unspecified statutory references are to the Penal Code.

in both felony cases to a total of four years in prison, consisting of four years in the second case and two years, concurrent, in the first case. The court imposed various fines and fees and it awarded pre-sentence conduct credits under section 4019 in both cases.

On appeal, Blaylock contends on equal protection grounds that he is entitled to additional conduct credit in both cases based on legislative changes to section 4019, which are expressly operative to crimes committed on or after October 1, 2011, a date subsequent to his crimes. We reject this contention and affirm the judgments.

STATEMENT OF THE CASE

I. *Factual Background*

A. *Case No. SS102694, the Second Case*²

On December 1, 2010, Christopher Rutledge, the owner of Rutledge Moving Systems, reported a possible credit card theft to the Monterey County Sheriff's Department. He told the sheriff's deputy that he had his moving trucks serviced by Fleet Services, and that he had provided the owner of Fleet Services, Chris Dorto, his credit card to pay for work completed on his trucks. The card was left overnight on the desk at Fleet Services on or about October 14, 2010. On October 15, 2010, Dorto returned the credit card to Rutledge after completing the billing.

In October 2010, Blaylock, who was then on probation, worked for Fleet Services. He had been having financial problems, was facing repossession of his truck by the secured lender, and owed child support payments to his wife, from whom he was then separated. Blaylock saw Rutledge's credit card on the desk at work and no one else was around. He wrote down the card number, along with the security code on the back, and returned the card to the desk. In mid-October, Blaylock provided the credit card number

² The convictions here resulted from pleas and as to the first case, number SS101645, there are no facts of the crime in the record. As to the second case, number SS102694, we take the facts of the crime from the probation report.

over the phone to the lender to whom he owed car payments and charged \$1,210.95, \$1,130.95, and \$866.48 against Rutledge's card to cover what he owed.

On October 15, 2010, Blaylock went into Castroville Auto Stereo to purchase stereo equipment for his truck and have it installed using Rutledge's stolen credit card number. He ordered the items he wanted and then later called in to provide the credit card information in two transactions. The equipment was sold to Blaylock and installed in his truck. He paid part of the price in cash but charged the rest to Rutledge's credit card.

Blaylock also called Rimco, a business that sells tires and rims. He special ordered tires and "flashy" rims for his truck, using Rutledge's credit card over the phone to make a down payment. The tires and rims were ordered and Blaylock went into the store to arrange monthly payments on a payment plan for the balance owed for the purchase and installation of the gear, which was put onto his truck. Blaylock never made any subsequent monthly payments.

Blaylock also went into Prunedale Motors and made an agreement with the owner for the purchase of a car, which Blaylock said was for his wife. Blaylock told the owner that his wife would be making monthly payments but that he would make the down payment of \$1,500, which was charged to Rutledge's credit card. Blaylock's wife never made any of the monthly payments.

Rutledge discovered the unauthorized charges on his credit card. He contacted the vendors to explain that the charges had been fraudulently incurred. They all told him that they had done business with someone named Danny Blaylock and that all charges fraudulently made on Rutledge's card were done over the phone. Rutledge recognized Blaylock's name as someone who worked for Chris Dorto at Fleet Services. Rutledge informed Dorto that Blaylock had been fraudulently using his credit card that had been provided to Dorto to charge for services performed on Rutledge's moving trucks. Dorto

knew that Blaylock had purchased expensive items for his truck, which confirmed for Dorto that Blaylock had used Rutledge's credit card, and Dorto consequently fired Blaylock on November 30, 2010.

As noted, Rutledge also contacted the Sheriff's Department. A deputy investigated and impounded Blaylock's truck. The deputy also contacted Blaylock, who ultimately admitted having used Rutledge's credit card to purchase the various items. Blaylock was then arrested.

II. *Procedural Background*

In the first case (SS101645), Blaylock was charged by complaint filed July 6, 2010, with discharge of a firearm with gross negligence in violation of section 246.3, subdivision (a) (count 1); receiving or concealing stolen property in violation of section 496, subdivision (a) (count 2); battery on a spouse, cohabitant or former spouse in violation of section 243, subdivision (e), a misdemeanor (count 3); vandalism in violation of section 594, subdivision (b)(1), a misdemeanor (count 4); hit and run resulting in property damage in violation of Vehicle Code section 20002, subdivision (a), a misdemeanor (count 5); resisting, obstructing, or delaying a peace officer in violation of section 148, subdivision (a)(1), a misdemeanor (count 6); and trespass in violation of section 602, subdivision (m), a misdemeanor (count 7).

On July 14, 2010, Blaylock conditionally pleaded no contest to count 1, discharge of a firearm with gross negligence on July 3, 2010, a felony, with the understanding that the charge could be reduced to a misdemeanor after one year of felony probation or completion of a minimum of 90 days in a residential alcohol treatment program. The court suspended imposition of sentence and placed defendant on probation for three years, with conditions including that he either serve 180 days in county jail or complete a residential treatment program for between 90 days and six months, and that he obey all laws. All the remaining charges were dismissed.

In the second case (SS102694), which concerned the unauthorized charges on Rutledge's credit card, Blaylock was charged by complaint on December 9, 2010 with three counts of commercial burglary in violation of section 459 (counts 1, 3, & 5); three counts of theft in violation of section 484e, subdivision (d) (counts 2, 4, & 6); and one count of receiving or concealing stolen property in violation of section 496, subdivision (a) (count 7). The crimes pleaded in the first six counts were alleged to have been committed between October 15-20, 2010, and the last count on December 2, 2010. The complaint was later amended to allege an enhancement that Blaylock's conviction in the first case constituted a prior strike within the meaning of section 1170.12, subdivision (c)(1). These new charges were also the subject of a petition and notice concerning Blaylock's alleged violation of the terms of his probation.

On December 21, 2010, in a negotiated disposition, Blaylock pleaded no contest to commercial burglary as alleged in count 1 and he admitted the prior strike and the probation violation. It was agreed that any sentence imposed would run concurrently with the sentence in the first case.

On January 11, 2011, a second notice of probation violation was filed, alleging that Blaylock had violated Vehicle Code section 23013, subdivision (a), reckless driving, a misdemeanor charge (alleged in the third case, MS292624) to which he pleaded no contest on January 13, 2011. That day he was sentenced to 10 days in county jail with credit for time served. Blaylock was also found that day to have violated probation as a result of the conviction.

On March 1, 2011, Blaylock moved to withdraw his plea in the second case (SS102694). The court held an evidentiary hearing and denied that motion.

On April 14, 2011, probation was revoked and terminated. Blaylock was sentenced in the second case on count 1, second degree burglary, to four years in prison, consisting of the middle term of two years, doubled for the prior strike. He was awarded

pre-sentence credits under section 4019 in the amount of 129 actual days, plus 64 days conduct credit, for a total of 193 days. All remaining charges were dismissed. In the first case (SS101645), Blaylock was sentenced on count 1, negligent discharge of a firearm, to the middle term of two years, concurrent to the sentence in the second case, for a total term in both cases of four years. He was awarded pre-sentence credit of 199 days, consisting of 133 actual days plus 66 days of conduct credit.

Blaylock appealed from the judgment of conviction, challenging the sentence or matters occurring after the plea but not affecting its validity.³ (Cal. Rules of Court, rule 8.304(b).)

DISCUSSION

I. *Defendant is Not Entitled to Additional Conduct Credits*

Blaylock contends that principles of equal protection entitle him to additional conduct credits in both cases. His contention is that the statutory changes to section 4019 and section 2933, expressly operative October 1, 2011, apply retroactively, in effect, so as to entitle him to one-for-one conduct credits under the current version of section 4019 rather than the one-for-two he was awarded in each case.

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner's good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

³ A notice of appeal was not timely filed but we granted defendant's motion for relief from default. In addition, Blaylock sought to challenge the validity of his plea and in this regard, he applied for a certificate of probable cause but his application was denied. His appeal is therefore limited to matters not affecting the validity of the plea.

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state's ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before *except* for those defendants who were required to register as a sex offender; those committed for a serious felony (as defined in § 1192.7); and those, like Blaylock, with respect to the second case with a prior conviction for a violent or serious felony.⁴ (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) For these persons, conduct credit under section 4019 accrued at the same rate as before despite the January 25, 2010 amendments. (Former § 4019, subds. (b)(2) & (c)(2).) These amendments to section 4019 effective January 25, 2010, did not state whether they were to have retroactive application.

California courts subsequently divided on the retroactive application of the amendments to section 4019, effective January 2010, and the issue was just decided by the California Supreme Court, which held that these amendments do not apply retroactively. (*People v. Brown* (June 18, 2012) __ Cal.4th __ [2012 Cal. Lexis 5263].)

Then, effective September 28, 2010, section 4019 was amended again to restore the less generous pre-sentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits. (Stats. 2010, ch. 426,

⁴ For Blaylock, his felony conviction in the first case (SS101645) involved an admitted violation of section 246.3, subdivision (a). Under section 1192.7, subdivision (c)(28), this means the commitment is for a serious offense, and is a strike. This conviction in the first case for a serious offense also furnishes the prior serious felony conviction with respect to the second case (SS101945), an admitted allegation.

§ 2.) The express provisions treating differently those defendants who are subject to sex-offender registration requirements, and those committed for a serious felony or, like Blaylock, with a prior conviction for a violent or serious felony, were also eliminated. (*Ibid.*) At the same time, and by the same legislative action, section 2933, previously applicable only to worktime credits earned while in state prison, was amended to encompass pre-sentence conduct credits for those defendants ultimately sentenced to state prison (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e).) In other words, as of September 28, 2010, section 2933 instead of section 4019 applied to the calculation of pre-sentence conduct credits for those defendants sentenced to a prison term, with an exception. This amendment to section 2933 provided for one-for-one pre-sentence conduct credits, more generous than those simultaneously provided under section 4019, but excluded those inmates required to register as sex offenders and those committed for a serious felony or those, like Blaylock, with a prior serious or violent felony conviction. Under this version of section 2933, subdivisions (e)(1) and (e)(3), these prisoners remained subject to an award of pre-sentence conduct credits under section 4019, accruing at the less generous one-for-two rate. (*Ibid.*) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to sections 4019 and 2933 in 2011, as relevant to Blaylock's equal protection challenge. These statutory changes, among other things, effectively made section 4019 again applicable to all prisoners for purposes of the calculation of pre-sentence conduct credits, eliminating this element of section 2933 that was in place from September 28, 2010 to September 27, 2011 only, and reinstituted one-for-one pre-sentence conduct credits for all prisoners. (§§ 2933 & 4019, subds. (b)(c)

& (f).) These changes to section 4019 were made expressly applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing, in this respect, legislative intent for prospective application only.⁵ (§ 4019, subds. (b), (c), & (h).)

As noted, Blaylock committed the crime in the first case (SS101645) on July 3, 2010, was convicted on July 14, 2010, and was sentenced to prison on April 14, 2011. Under the law in effect on any of these dates, he was properly awarded conduct credits on a one-for-two basis (133 days actual credit and 66 days conduct credit).⁶ As to the second case (SS102694), Blaylock committed the crime on October 15, 2010, was convicted on December 21, 2010, and was sentenced on April 14, 2011. Similarly, under the law in effect on any of these dates, he was properly awarded conduct credits on a one-for-two basis (129 days actual credit and 64 days conduct credit).⁷

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, are to have prospective application only, Blaylock contends, on equal protection grounds, that he is entitled to the reinstituted one-for-one conduct credits implemented by those changes. He argues that *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) compels this result, contending that it held that a new statute that provides for pre-sentence credits for prison inmates is fully retroactive to all prisoners by virtue of the equal protection clause. He also cites *People v. Sage* (1980) 26

⁵ These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 481; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

⁶ This is because as to the dates of conviction and sentencing, Blaylock fits into that category of persons committed for a serious felony or with a prior conviction for a violent or serious felony, who were treated less generously as to an award of pre-sentence conduct credits under various iterations of the statute operative January 25, 2010 through September 30, 2011.

⁷ See footnote 7, *ante*, as to all three dates.

Cal.3d 498, 507-508 (*Sage*), and urges that it held that felons were similarly situated to all other jail inmates, implicitly overruling *In re Stinette* (1979) 94 Cal.App.3d 800 (*Stinette*), and that the then current version of section 4019 was violative of equal protection because it denied conduct credit to felons who were sentenced to prison while making such credits available to other jail inmates.

Preliminarily, to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. In considering whether state legislation is violative of equal protection, we apply different levels of scrutiny to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) Where, as here, the statutory distinction at issue neither “touch[es] upon fundamental interests” nor is based on gender, there is no equal protection violation “if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].) Under the rational relationship test, “ ‘ ‘ ‘ a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are “plausible reasons” for [the classification], “our inquiry is at an end.” ’ ’ ’ ” (*Hofsheier, supra*, at pp. 1200-1201, italics omitted.)

In *Kapperman*, the Supreme Court reviewed a provision (then-new § 2900.5) that made actual custody credits prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those

already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) But *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. (See, e.g., *People v. Olague* (2012) 205 Cal.App.4th 1126, 1132-1143 (*Olague*).) A further significant distinction may be drawn between *Kapperman* and this case, in that the liberalization of credit at issue in *Kapperman* applied to prisoners regardless of the offense for which they were imprisoned, whereas the change here affects three well defined sub-classes of offenders: those required to register as sex offenders; those committed for a serious felony, as defined as defined in section 1192.7; or those with a prior serious felony, as defined in section 1192.7, or a prior violent felony, as defined in section 667.5. (*Olague, supra*, at p. 1135.)

Sage is likewise inapposite, because it involved a prior version of section 4019 that allowed pre-sentence conduct credits to misdemeanants, but not felons. (*Sage, supra*, 26 Cal.3d at p. 508.) The high court found that there was neither a “rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons.” (*Ibid*, fn. omitted.) But here, assuming without deciding that defendant is similarly situated with those receiving the benefit of the legislative changes, the purported equal protection violation is temporal, rather than based on defendant’s status as a misdemeanor or felon. (*People v. Floyd* (2003) 31 Cal.4th 179, 189-191 [“ ‘punishment lessening statutes given prospective application’ ” on a certain date “ ‘do not violate equal protection’ ”].) The question in this case, which is not answered by *Sage* given its holding, is whether there is a rational basis for the different treatment vis a vis conduct credits.

One of section 4019's principal purposes is to motivate or reward good behavior while in pre-sentence custody, and it is impossible to influence behavior after it has occurred. The fact that a defendant's conduct cannot be retroactively influenced provides a rational basis for the Legislature's express intent that the October 2011 amendments to section 4019 apply prospectively. (*Stinette, supra*, 94 Cal.App.3d at p. 806 [prospective only application of provisions of Determinate Sentencing Act (§ 1170 et seq.) upheld over equal protection challenge]; *In re Strick* (1983) 148 Cal.App.3d 906, 912-913 [prospective only application of statutory changes designed to incentivize productive work and good conduct of prison inmates upheld over equal protection challenge].) This is so even if an inmate has already earned the maximum amount of good conduct credits available under the applicable former version of the statute and is only claiming entitlement to *additional* conduct credits for the same good behavior that earned him those conduct credits in the first place. What illustrates this point is that unquantifiable and unidentifiable group of inmates who did not earn good conduct credits in the same period of time as defendant, but who might have behaved better given enhanced incentives.

We acknowledge that the specific purpose of the amendments to section 4019 that became operative October 1, 2011, was to address the "state's fiscal emergency by effectuating an earlier release of a defined class of prisoners, thereby relieving the state of the cost of their continued incarceration and alleviating overcrowding in county jail facilities. [Citations.]" (*People v. Borg* (2012) 204 Cal.App.4th 1528, 1537-1539 [amendments do treat similarly situated classes of persons disparately but the legislation nevertheless bears a rational relationship to a legitimate state purpose].) But we agree with our colleagues in Division One of the First Appellate District that "[r]educing prison populations by granting a prospective-only increase in conduct credits strikes a proper,

rational balance between the state's fiscal concerns and its public safety interests.” (*Id.* at p. 1539; *Olague, supra*, 205 Cal.App.4th at p. 1136.)

We accordingly reject Blaylock's contention that he is entitled to additional conduct credits based on amendments to section 4019, operative October 1, 2011.

DISPOSITION

The judgments are affirmed.

Duffy, J.*

WE CONCUR:

Rushing, P.J.

Premo, J.

People v. Blaylock
No. H037280

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.